Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1055

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT PRICE, *et al.*,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION

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Although respondents agree that the two categories of questions raised by the petition are important, they urge that certiorari not be granted now. Respondents' objections are insubstantial.

1. As to the "threshold questions pertaining to the merits of petitioners' claims (Questions 1 and 2)," respondents admit that the court of appeals' decision conflicts with *Beck v. Communications Workers*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *petitions for cert. filed*, 55 U.S.L.W. 3317 (U.S. Oct. 17, 1986) (No. 86-

637), 55 U.S.L.W. 3454 (U.S. Dec. 11, 1986) (No. 86-966). Memorandum of Respondents at 1-2.[1] Respondents also agree "that the conflict is over issues of profound [practical and doctrinal] importance that warrant resolution by this Court." *Id.* at 2, 3. Consequently, this case deserves plenary review under the standards of Supreme Court Rule 17.1.

Nonetheless, respondents urge that a writ issue only in No. 86-637 in *Beck*, and that this petition be held pending decision in *Beck*, because of imagined procedural difficulties should certiorari be granted in both cases. The perceived case-handling problems are trivial, and respondents' suggestion disingenuous, given this Court's practice and the circumstances of these cases.

This Court occasionally grants review simultaneously in two cases presenting substantially the same issue and, pursuant to Rule 37.3, consolidates them for argument. In that event, the parties whose interests are aligned may, but need not, file a consolidated brief, but under Rule 38.4 normally must agree on one counsel to present argument. On other occasions, the Court simultaneously grants review in two similar cases and sets them for argument together, one immediately after the other or in tandem. In that event, briefs and arguments are not consolidated, but counsel should coordinate their efforts. *See* R. Stern, E. Gressman & A. Shapiro, *Supreme Court Practice* § 14.6 (6th ed. 1986).

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[1] The decision below also conflicts with *Beck v. Communications Workers*, 776 F.2d 187, 1205-09 (1985) (governmental action), *aff'd on reh'g on other grounds*, 800 F.2d 1280 (4th Cir. 1986); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970) (duty of fair representation and, implicitly, governmental action); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971) (governmental action.)

The petitioners/cross-respondents in *Beck* (the Communications Workers, *et al.*) and the respondents in this case (the Auto Workers, *et al.*) would have no difficulty in consolidating or coordinating their briefs and arguments, because their counsel of record is the same in both cases, here and in the courts of appeals. Although the respondents/cross-petitioners in *Beck* and the petitioners in this case are represented by different counsel of record, they have the same claims,[2] and their counsel have already cooperated here and below.

Moreover, in their petition in No. 86-637 in *Beck*, the Communications Workers argue that in this case the Second Circuit correctly determined the issues of law common to the cases. If, through their common counsel of record, the Auto Workers are thus able to present their case to the Court, fairness requires that petitioners be permitted to do so as well through their own counsel and on equal terms. That can occur only if review is granted in both cases and they are consolidated or scheduled for argument together.

2. As to the "procedural/remedial issues" presented in Questions 3 and 4 of the petition, respondents wrongly contend that "the courts below * * * had no occasion to address" them. Memorandum of Respondents at 6.

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[2] The only distinction between the cases as to Questions 1 and 2 is that the compulsory unionism agreement in *Beck* is an "agency shop," *see* 776 F.2d at 1189, while in this case it is a "union shop" that the court of appeals erroneously viewed as creating formal union membership, *see* App. vi, xiv-xx. That distinction, however, is an additional reason for reviewing both cases, so that this Court can settle the merits in both contexts, and can correct the court of appeals' failure to acknowledge the limited nature of the "membership" that can be required under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982). *See Pattern Makers v. NLRB*, 105 S. Ct. 3064, 3071 & n.16 (1985).

True, the district court did "not pass on the adequacy of the rebate scheme." App. lvi. However, the court of appeals *did*, as a *statutory* (not constitutional) matter, and Questions 3 and 4 are ripe for review.

The Second Circuit held the Auto Workers entitled to summary judgment on petitioner employees' claim for breach of the duty of fair representation for two reasons. The court first found no breach of the duty of fair representation when a union spends compulsory payments of objecting employees for non-bargaining purposes. App. xix. It then held alternatively that, if such expenditures could breach the duty, the union's internal rebate scheme negated any claim of unfair representation:

> Without deciding whether that particular procedure would be *constitutionally* adequate if government action had been found here, we note that the union's rebate program, at a minimum, tends to negate any inference of bad faith.
>
> *Hence*, even assuming the *statutory* duty of fair representation applies here, *appellants' claims do not establish that the union breached that duty*. The judgment of the district court is *therefore* affirmed.

App. xx (citation omitted) (emphasis added).

The quoted language is no mere aside, as the Memorandum of Respondents suggests at page 6 note 3. It is a *holding* that the Auto Workers' rebate procedure, on its face, negates petitioners' statutory claim that the use of their compulsory dues for non-bargaining purposes breaches the duty of fair representation. That decision is clearly erroneous in light of *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984), and *Teachers Local 1 v. Hud-*

son, 106 S. Ct. 1066 (1986). *See Beck v. Communications Workers*, 776 F.2d 1187, 1204 n.25 (1985), *aff'd on reh'g en banc*, 800 F.2d 1280 (4th Cir. 1986).

Plenary review of *Beck* will address the procedural/-remedial questions raised by this case only if the Court grants the employees' cross-petition (No. 86-966), as well as the union's petition (No. 86-637), in *Beck*. Even then those questions are not identical in the two cases, because the court-ordered rebate scheme in *Beck* differs substantially from the wholly intra-union (and more objectionable) scheme the Second Circuit sanctioned in this case. This Court should grant writs in both cases to declare both schemes statutorily and constitutionally inadequate and, thus, avoid future confusion among lower courts as to the procedural safeguards necessary to protect the speech and associational rights of nonunion employees.

* * *

CONCLUSION

For the foregoing reasons, as well as those urged in the petition, certiorari should be granted.[3]

Respectfully submitted,

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February 19, 1987

[3] The Court has invited the Solicitor General's views in No. 86-637, *Communications Workers v. Beck*, 107 S. Ct. 641 (1987) (mem.), and neither petition in *Beck* has been scheduled for conference. Petitioners are informed that this case will be conferenced on February 27, 1987. If certiorari is not then granted, the Court should defer consideration of the petition herein until the petitions in Nos. 86-637 and 86-966 are distributed, and consider and dispose of all three petitions at the same time.